Supreme Court, U.S.
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No. 09-933

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In The
Supreme Court of the United States

JANEEN MILLER; JAMES MAHOOD,
Petitioners,

v.

KRISTEN NICHOLS; BRENDA HARVEY, in her capacity as Commissioner of Maine Department of Health and Human Services,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeal for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Has the First Circuit misapplied Maine's law of issue preclusion in dismissing the Plaintiffs' claims for violations of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, and First Amendment Associational and Expressive rights when those issues were not expressly decided by the State Court's Decision in a family law matter.

2. When a party is compelled to introduce facts establishing bias into evidence in a State Court family law proceeding which precludes consideration of any claim other than family law claims does the introduction of those facts, when they are not subsequently specifically determined by the State Court proceeding, preclude a Federal Court under the doctrine of issue preclusion from exercising jurisdiction for violations of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, and First Amendment Associational and Expressive Rights?

3. Does 42 U.S.C. §1983 operate to create a private right of action under HIPAA when an State Caseworker acting under the color of state law illegally discloses confidential and privileged medical information?

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OPINION BELOW

The opinion of the First Circuit Court of Appeals is reported at *Miller v. Nichols, et al.*, 586 F. 3d 53(1st Cir. 2009). The District Court decision was reported in *Miller v. Nichols, et al.*, 592 F. Supp. 2d 191 (D. Me. 191). The decisions are reproduced at Appendices A and B respectively.

JURISDICTION

The First Circuit filed its decision on November 4, 2009. This Court has jurisdiction under 28 U.S.C. §1254(1) to review the Circuit Court's decision on a Writ of certiorari.

STATUTORY PROVISIONS INVOLVED

29 U.S.C §794

No otherwise qualified individual with a disability in the United States, as defined in section 705(20), shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

42 U.S.C §1983

Every person who, under color of any statue, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or mission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. §1320d-6

Wrongful disclosure of individually identifiable health information

(a) Offense

A person who knowingly and in violation of this part—

(1) uses or causes to be used a unique health identifier;

(2) obtains individually identifiable health information relating to an individual; or

(3) discloses individually identifiable health information to another person,

shall be punished as provided in subsection (b) of this section.

42 U.S.C. §12132

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

CONSTITUTIONAL PROVISION INVOLVED

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

For Janeen Miller there are no there are no truer words than those of Mary Chapin Carpenter, "Everything she got, she got the hard way." Ms. Miller was in college when she was involved in an automobile accident, which led to a post-traumatic stress disorder. As Ms. Miller's mental health deteriorated, she was compelled to leave college. At first, she tried to work but her condition interfered, and she continued a downward spiral that eventually left her homeless for intermittent periods of time. By the time, she was 30, Ms. Miller had little hope for anything approaching a normal life.

Then, after several years in the wilderness, when Ms. Miller was 37 years old, she met Jim Mahood. Mr. Mahood was older and had raised a family and made a successful business in Rhode Island. He was in Maine working on a new business venture.

Ms. Miller and Mr. Mahood began a loving and supportive relationship and eventually conceived a child. On February 19, 2004, Ms. Miller gave birth to G.M.

During her pregnancy, Ms. Miller had researched everything she could on raising children. She read articles on the Internet and discussed her findings with her prenatal physician. Ms. Miller read, was told, and believed that the best nutrition for a newborn child is mother's breast milk.

Unfortunately, Ms. Miller is painfully thin, almost cachectic. Ten months after G.M. was born, Ms. Miller took the child for a check-up with Dr. Sze. Dr. Sze expressed a concern that Ms. Miller, because of her light weight, was not providing enough breast milk and ordered Ms. Miller and Mr. Mahood to feed G.M. formula. If not, Dr. Sze threatened to call Maine Department of Health and Human Service.

Ms. Miller and Mr. Mahood were horrified. They took G. M. to Dr. Pearsall of Dover-Foxcroft for a second opinion. Dr. Pearsall noted that G.M. "appears slightly thin, but not emaciated." Dr. Pearsall came up with a plan to supplement Ms. Miller's breast milk with formula, cereal, and strained vegetables. The program was successful. Within a week, G.M. had gained a pound, within a month two pounds, within five months, G.M. had gained five and a half pounds. Dr. Pearsall repeatedly told Ms. Miller and Mr. Mahood that G.M. had gained adequate weight from the last appointment. Unfortunately, even with her weight gain, G.M. still was in the lower percentiles of her age groups by height and weight.

Ms. Miller and Mr. Mahood continued to have G.M. treated by Dr. Pearsall through October 27, 2005. On December 6, 2005, Ms. Miller and Mr. Mahood were living in Portland and arranged for G.M.'s treatment to be switched to Dr. Rovner who was located in the Portland area. Dr. Rovner examined G.M. on December 6, 2005.

Shortly after that visit, G.M. began to show flu-like symptoms. She was experiencing diarrhea and seemed to have had some behavioral changes. Ms. Miller and Mr. Mahood called Dr. Rovner a couple of times and each time they were told that Dr. Rovner would examine G.M. at her regularly scheduled visit. Unfortunately, two winter snowstorms postponed the visits.

On December 25, 2005 at about 5:45 pm G.M.'s body went rigid, her eyes rolled back in her head and she stopped breathing. Ms. Miller was hysterical and yelled for Mr. Mahood to call 9-1-1. By the time the ambulance attendants arrived G.M. was breathing fine. The ambulance attendants checked G.M out and thought her well enough that they advised that they did not intend to transport G.M. to the hospital Ms. Miller insisted that they do so and G.M. was eventually taken to Southern Maine Medical Center.

At the Hospital Dr. Hayman, who was just out of residency, examined G.M., and because her height and weight were in the lower percentiles, made a diagnosis of failure to thrive. In treating G.M., Dr. Hayman found Ms. Miller difficult and "beyond the norm." Subsequently, though Dr. Hayman admitted that Ms. Miller had not refused treatment for G.M.

Dr. Hayman called Maine Department of Health and Human Services.

On December 27, 2005, Maine DHHS sought and was granted a preliminary protection order. The Court, as required by Maine Law, scheduled the matter for an immediate review to determine whether there was jeopardy. On the recommendation of Court appointed counsel, with DHHS' representation that it needed the order to provide Ms. Miller and Mr. Mahood with the necessary services for reunification, Ms. Miller and Mr. Mahood agreed to a finding of jeopardy and entry of a protective order.

After entry of the protective order, Ms. Miller and Mr. Mahood voiced concerns at team meetings as to whether G.M. should receive any more vaccinations. The concerns were based, in part, on religious beliefs. One vaccine is made from monkey cells and Ms. Miller did not believe God wanted her child injected with parts from other species. Other vaccines, Merck's MMR or Pro-Quad are made from stem cells of aborted fetuses, and Ms. Miller does not believe in abortion. When the Department advised that it intended to vaccinate G.M. over Ms. Miller and Mr. Mahood's objection, Ms. Miller and Mr. Mahood sought and received a TRO to stop the vaccinations. The Department subsequently sought to lift the TRO and advised Ms. Miller and Mr. Mahood that if they did not withdraw their opposition the Department would seek to terminate their parental rights. Ms. Miller and Mr. Mahood refused to withdraw their objections and on October 16, 2006, just 10 days after the TRO hearing, the Department filed its Petition to Terminate Parental

Rights. The reason that termination was sought, according to State Caseworker Ms. Nichols was G.M.'s diagnosis of failure to thrive and the fact that Ms. Miller could possibly be schizophrenic.

Leaving aside the issue of Ms. Miller's mental health, Mr. Mahood advised Ms. Nichols that he was neither schizophrenic nor even diagnosed with any kind of mental illness. Ms. Nichols then made it a condition for reunification that if Mr. Mahood wanted G.M., he would have to sever his relationship with Ms. Miller.

Thereafter, the Department did nothing to re-unify the family and moved forward with the petition. The matter was scheduled for trial in August of 2007, and consumed eight days over the next four months.

By Maine Rules of Civil Procedure, Rule 80(b) Parties in a family law matter are prohibited from raising any claims other than those relating to the family law issue immediately before the court in any family law proceeding.

During the course of the trial, Ms. Nichols was asked:

> "Q. Are you familiar with the Americans with Disabilities Act?
> A. No.
> Q. When you went to the Department, did they train you with regards to your responsibilities to your job tasks and how you work with people?

A. Yes.

Q. Were you ever trained that, when you face someone that has a mental illness or a mental health issue that you need to make some kind of reasonable accommodations to work with them?

A. Yes.

Q. Can you tell me what reasonable accommodations you made in working with Ms. Miller?

A. In the first year, I tried very hard. We did have family team meetings. We did – I had a lot of conversations with her. We met frequently. I did converse. We did talk about issues.

Q. Family team meetings are something that you do every time you have this type of situation, right?

A. Right.

Q. Nothing different that you did for Ms. Miller than you did for anyone else.

A. Right.

At the close of the trial, the Court stated that there was insufficient evidence to terminate parental rights.

Nonetheless, on January 23, 2008 the Court entered an Order terminating the parental rights of Ms. Miller and Mr. Mahood. Nowhere in that Order is there any discussions, much less decisions concerning the ADA, Section 504 of the Rehabilitation Act of 1973, First Amendment Religious Rights, Privacy Rights, or First Amendment Associational Rights.

On February 1, 2008, Ms. Miller filed Requests for Additional Findings of Fact and Rulings of Law. Mr. Mahood filed his requests on January 30, 2008. On February 7, 2008, the Court issued its Order on the various post-judgment requests. Again, the Court's Order is entirely devoid of any mention of the issues raised in the Plaintiffs' Federal Court complaint, which is the subject matter of this action.

Ms. Miller and Mr. Mahood appealed to the Law Court. On August 12, 2008, the Court issued a one-paragraph decision. It too is entirely devoid of any discussion or decision concerning the claims presented in the Plaintiffs' Federal Court Complaint.

On October 20, 2008, Ms. Miller and Mr. Mahood filed their Federal Court Complaint alleging that the actions of the Maine Department of Health and Human Services violated their Federal protected rights under the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, and their Associational and Expressive Rights protected by the First Amendment.

The Federal District Court noted that the facts as alleged were troubling but nonetheless assumed that the State Courts must have dealt with the issues raised by the Plaintiffs' complaints otherwise the termination proceedings would have violated Ms. Miller and Mr. Mahood's due process rights.

Additionally, Ms. Miller alleged that the State Caseworker's disclosure of her mental health records to a doctor who was analyzing the child for vitamin D deficiency was a violation of her rights protected by

HIPAA. Since no State or Federal official took action to protect those rights, Ms. Miller claimed the right to do so under 42 U.S.C. §1983.

The First Circuit concluded that based on this Court's 1930 decision in *Grubb v. Pub. Util. Comm'n of Ohio*, 281 U.S. 470, 477-78 (1930), that the law of issue preclusion did not require that the issue actually have to be joined, only that it could have been joined, in order for the doctrine of issue preclusion to apply.

Trapped between the State Court, which precluded the raising of the civil rights issues by rule, and the Federal Court's denouement that the issues must have been raised in the State Court proceedings, Ms. Miller and Mr. Mahood turn to this Court asking only leave to present their claims of State violation of their civil rights to the Federal Court.

REASONS FOR GRANTING CERTIORARI

On November 4, 2009, the First Circuit Court of Appeals denied Janeen Miller and Jim Mahood's Appeal from the Federal District Court of Maine's Decision and Order dismissing their claims for violations of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, and 42 U.S.C. §1983.

The question on appeal was not whether the complaint stated a claim for civil rights violations, but whether the Federal Court was precluded from

hearing those claims because of a Maine Family Court Decision.

The Plaintiffs assert that the First Circuit erred when it concluded, that even though neither the underlying facts nor any discussion of the civil rights issues appear anywhere in the State Court Decisions, that the doctrine of issue preclusion applied because the issues must have been decided otherwise the State's action would be improper.

The First Circuit Court's decision is based upon an assumption that the civil rights issues were considered in the context of the Maine District Court's jeopardy order. To deny individuals who come before the Court seeking vindication of constitutional and civil rights even the opportunity to be heard based on an assumption is an error.

A. The Law of Issue Preclusion

Under Title 28 U.S.C. §1738, the Federal Full Faith and Credit Statue, a "Federal court must give to a state court judgment the same preclusive effect as would be given that judgment under the law of the state in which the judgment was rendered." *Migra v. Warren City School Dist. Bd. Of Education, 465 U.S. 75, 81, 104 S. Ct. 892, 79 L.Ed 2d. 56 (1984).* As such, the preclusive effect of any state court judgment is determined under the law of the State in which the judgment was rendered. *In re: Sonus Networks, Inc., 499 F. 3d. 47, 56 (1st Cir. 2007).* Since the judgment upon which the First Circuit relied was rendered by a Maine Court, Maine Law controls.

Maine Law provides that a prior judgment will only operate to preclude consideration of an issue if:

> 1) the identical issue was determined by a prior final judgment, and;
> 2) the party estopped has a fair opportunity and incentive to litigate the issue in a prior proceeding.
> *Cline v. Maine Coast Nordic, 1999 Me. 72, 728 A. 2d 686 (Me. 1999); Perry v. H.O. Perry & Sons Co., 1998 Me. 131, 711 A. 2d 1303; State v. Hughs, 2004 Me. 141, 863 A. 2d 266 (Me. 2004).*

Further, Maine Law provides that the party asserting issue preclusion has the burden of demonstrating the specific issue was actually decided in the earlier proceedings. *Macomber v. MacQuinn-Tweedie, et al., 2003 Me. 12; 834 A. 2d 131 (Me. 2003);* c.f. 18 Charles Alan Wright, et al., *Federal Practice and Procedure*, §§4420 516-518 (2nd ed. 2002).

To prove that an issue has been precluded by a prior judgment, the moving party must show not only that the specific issues were decided by the prior judgment, but also that the findings, relating to the specific issues upon which preclusion is sought, were essential to that judgment. *Beale v. Chisholm, 626 A. 2d 345, 347 (Me. 1993).* "If issues are determined but the judgment is not dependent upon the determinations, relitigation of those issues in a subsequent action between the parties is not precluded... Restatement Second of Judgments §27, Comment h (1982)" *Beale, supra at 347.*

That position is not unique, Wright, Miller & Cooper in their treatise on *Federal Practice and Procedure* note that there is a critical distinction between findings essential to a judgment, and those that are not, for purposes of issue preclusion. If a finding is not essential to the judgment then it does not have a preclusive effect in subsequent litigation. Wright, Miller & Cooper, *Federal Practice & Procedure* §§ 4421(1981).

To prevail on its claim for dismissal the State must not only prove that the specific issue upon which it seeks preclusion was actually determined by the underlying judgment, it must also prove that the specific issue was essential to the judgment.

B. The Specific Issues were Never decided by the State Court Judgment

The underlying judgment, upon which the State seeks to rest its preclusion claim, is a judgment terminating the parental rights of the parents. In arguing that the issues concerning the Plaintiffs' civil rights claims were decided by the State Courts, the State argues that the Plaintiffs vigorously litigated the issues before the court. The Plaintiffs did raise issues concerning the ADA and HIPAA violations before the Court.[1] However, the fact that the issues were vigorously litigated does not give the judgment preclusive effect.

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[1] The issues were exposed during cross-examination and raised in the context of witness bias.

In *Beale v. Chisholm, 626 A. 2d 345 (Me. 1993)*, the Plaintiffs argued that a Defendant's criminal conviction for manslaughter precluded the Defendant from challenging the issue of negligence in a subsequent civil proceeding. In finding that there was no issue preclusion the Court held:

> "The critical distinction for the purpose of issue preclusion between those findings that are essential to a judgment and those that are not stems from the recognition that the tribunal that decided the first case may not have taken sufficient care in determining an issue that did not affect the result, even though the parties vigorously litigated the issue, and that 'Appellate review may not be available to ensure the quality of the initial decision.' Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* §§4421 at 193(1981)." *Beale, supra* at 347 [Emphasis supplied].

The issue of whether the plaintiffs' "vigorously litigated" their civil rights claims before the State tribunal is a red herring. Vigorously litigating an issue has no bearing on whether a judgment will preclude litigation of an issue. The specific issue must actually be decided by the Court to have a preclusive effect.

Nowhere in the State District Court's January 23, 2008 Order Terminating Parental Rights is there any discussion of the ADA or Civil Rights violations

which the Plaintiffs seek to pursue in the Federal Court. If the issues were not even discussed, then it is impossible that the issues were decided by the Court's judgment. If the ADA and Civil Rights issues were not discussed and not decided by the Court's January 23, 2008 Order, then the "identical issue" was not determined by the prior judgment, and the judgment cannot operate to preclude litigation of those issues. *Gilman v. Dept. of Human Services, 1998 Me. 122, 711 A. 2d 154 (Me. 1998); Machias Savings Bank v. Ramsdall, et al., 1997 Me. 20, 689 A. 2d 595 (Me. 1997).*

After the State District Court's January 23, 2008 Order, Ms. Miller, pursuant to M.R.Civ.P. Rule 52, specifically requested that the Court make additional findings of fact and rulings of law. Within those requested findings, the Plaintiff sought that the Court determine that the Defendant Nichols knew that she had to make reasonable accommodations for Ms. Miller but had failed to do so. Ms. Miller also requested a ruling of law that Defendant Nichols had violated HIPAA. On February 7, 2008, the State District Court entered an additional page and a half Order. Once again, there were no discussions of the Plaintiffs' ADA or Civil Rights claims. In fact, the Court notes that though it has received requests for additional findings from both Ms. Miller and Mr. Mahood, the "findings and conclusions" of its January 23, 2008 were incorporated into the February 7, 2008 Order. After making a further ruling on an issue raised by the Guardian concerning the Court's failure to discuss its lack of reliance on the parents' witnesses and Mr. Mahood's claim concerning passivity, the Court concludes, "No further findings are necessary."

In concluding that it had previously made findings which supported the termination, and that no further findings were necessary, the Court limited its judgment to the issues concerning whether it found jeopardy and whether termination was in the best interest of the child. The Court's statement as to further findings, implicitly, if not explicitly recognizes that there are other issues, which the Court does not deem necessary to its judgment and which are not determined by the Court's decision.

The limitation of the finding to the conclusions germane only to the family law proceedings appears to be, as it should, standard operating procedure in Maine's District Courts. In a case involving an identical claim, that the state of Maine Department of Health and Human Services had discriminated against a mentally ill individual the presiding judge held:

> "This Court does not imply that Dr. Handler is without remedy if she can demonstrate that she was denied the benefits of the Department's reunification services or discriminated against in the provision of reunification services by virtue of a mental disability. The remedy for such a violation of the ADA-if one can be proven-does not lie within this proceeding, however. *See In re Anthony P., 84 Cal. App. 4th 1112, 1116, 101 Cap. Rptr. 2d 423, 425-26 (Cal. Ct. App. 2000)* ("[T]he ADA is inapplicable when used as a defense

> by the parent(s) in [termination] proceedings . . . . The parent 'may have a separate cause of action under the ADA based on the County's actions or inactions; such a claim, however, is not a basis to attach the [termination] order.'" (*quoting In re TorranceP., 522 N. W. 2d 243, 245 (Wisc. Ct. App. 1994))"*
> *In re D. H., State of Maine District Court, Belfast, BEL-PC-05-015.*

The position of the Maine District court is directly at odds with the decision of the First Circuit. Though the First Circuit was aware that this was the position Maine's family Courts took regarding the applicability of the ADA to family law proceedings it nonetheless held that subsequent litigation of ADA claims was barred by the doctrine of issue preclusion. The First Circuit's decision leaves the Plaintiffs in a surreal netherworld between the State and Federal systems. Each claiming that their Court cannot provide a remedy for the Plaintiff's claimed wrong.

On February 29, 2008, the Plaintiffs filed a Notice of Appeal to the Maine Supreme Judicial Court. In Ms. Miller's Brief, she argued that Ms. Nichols failure to grant a reasonable accommodation under the ADA was evidence of bias. In a four-sentence opinion, reproduced in its entirety here, the Supreme Judicial Court upheld the State District Court Judgment.

> "The parents of G.M. appeal from a judgment entered in the District Court (Portland, Bradley, J.)

> terminating their parental rights to G.M. pursuant to 22 M.R.S.A § 4055(1)(B)(2)(2007). Contrary to the parents' contentions, the court rationally could have found clear and convincing evidence in the record to its determinations that both parents are unable to protect G.M. from jeopardy and these circumstances are unlikely to change within a time reasonable calculated to meet the child's needs. See *In re Thomas D., 2004 ME 104, 21, 854 A. 2d 195, 201.* The court also rationally could have found clear and convincing evidence in the record to support its determination that termination of the parents' parental rights is in G.M.'s best interest. See *id.*; see also *In re Michaela C., 2002 ME 159, 27, 809 A. 2d 1245, 1253.* Finally, the father's argument that the Department did not engage in legitimate reunification efforts is not supported by the record."

That opinion is entirely devoid of any discussion, much less decision of the factual issues concerning the ADA and the Plaintiffs' Civil Rights Claims. There is no evidence that the Maine Supreme Judicial Court even considered the issues, which are the subject matter of the Plaintiffs' complaint. If the Maine Supreme Judicial Court did not consider the issues then, a fortiori, the issue could not have been determined by the final judgment of that Court. If the identical issues were not necessarily determined by the judgment, then

the judgment cannot have preclusive effect for those issues. *Gilman, supra*; *Machias Savings Bank, supra*.

C. The Civil Rights Issues Were Not Essential to the State Court Judgment.

Under Maine's law of issue preclusion, the issues upon which the doctrine may be invoked must be essential to the underlying judgment in order for them to preclude their subsequent litigation in a different matter.

The underlying action, upon which the State's assertion of issue preclusion rests, was the State's Petition for the Termination of Parental Rights. The issues necessary in resolving a Petition for Termination are identified in Title 22 M.R.S.A. § 4055. In relevant part, they are:

> (1) that "[c]ustody has been removed from the parent under § 4035 [child was in jeopardy][2] " and (2) that "[t]he court finds, based on clear and convincing evidence, that: [t]ermination is in the best interest of the child; and...[3][t]he parent is unwilling or unable to protect the child from jeopardy and these circumstances are unlikely to change within a time reasonably calculated to

[2] Though not relevant to this proceeding, it is of note that custody was removed from the parents under §4035 when the parents were promised by the State that if they agreed to jeopardy it would facilitate the return of the child. It is more than a little problematic that the State obtained custody by agreement with a woman that it subsequently claimed was incompetent.

meet the child's needs." *22 M.R.S.A.§4055(1)(A)(1)(a)& (B)(2)(a)(b)(i).*

Those three issues (1) jeopardy, (2) best interest of the child, and (3) unlikely change in circumstances, are the only issues which were essential to the State Court judgment on termination.

The issues brought in the Plaintiffs Federal Court complaint are for violations of the ADA, Section 504 of the Rehabilitation Act of 1973, and Federal Civil Rights law. Those issues were not essential to the State Court's judgment on the Section 4055 termination petition.

As such, even if this Court were to find that somehow the State Court had previously determined the issues now being raised by the Plaintiffs' Federal Court complaint, because those issues were not "essential" to the underlying State Court judgment, any determination of those issues cannot have preclusive effect.

As the Maine Supreme Judicial court held in *Beale v. Chisholm, 626 A.2d 345 (Me 1993)* if the:

> "...judgment is not dependent upon the determination, relitigation of those issues in a subsequent action between the parties is not precluded. Such determinations have the characteristics of dicta...Restatement Second of Judgments §27 Comment h (1982)." [internal quotation marks omitted]. *Beale, supra at 347*

Under Maine law, the only impact the State court rulings could have on the Plaintiffs' claims would be as dicta. Dicta does not have a preclusive impact.

Since any rulings which the State Court may have made on the Plaintiffs' current Federal claims were not essential to the issues necessary to terminate parental rights, those State Court determinations cannot preclude the Plaintiffs from litigating their Federal Claims.

D. The Plaintiffs did not have A Fair Opportunity to Litigate the Issues In the Prior Proceeding

Termination proceedings in the Maine State Court are governed by M.R.Civ.P.,Rule 80. In subpart (a) the Rule provides that:

> "These Rules shall apply to actions for divorce, annulment, judicial separation, separate support, and determination of parental rights and responsibilities, except as otherwise provided in this rule." Rule 80(a) M.R.Civ.P.

The determination of parental rights and responsibilities includes within it those actions for termination of parental rights. As such, the State Court proceedings upon which the State seeks to rest its claim of issue preclusion were all governed by M.R.Civ.P. Rule 80.

However, M.R.Civ.P. Rule 80 specifically prohibited the Plaintiffs from raising their ADA, Section 504, and Civil Rights claims. The rule provides:

> "No counterclaim shall be permitted in any action under this rule except for divorce, annulment, separate support or a determination of parental rights and responsibilities." M.R.Civ.P. Rule 80(b)

The Maine State Court could not consider, nor make any awards for, any of the federal claims now asserted by the Plaintiffs in the instant action.

Certainly, the State will argue that while the State Court could not consider the claims, it was free to consider the issues underlying the claims. However, such a distinction does not withstand due process scrutiny. The idea that a party is prohibited from raising claims by Rule which claims are then precluded by the determinations made where the claims could not be raised does not provide "a fair opportunity to litigate."

In order for a party to have a fair opportunity to litigate a matter they must either control the litigation or could have or actually did substantially participate in the litigation. *Tungate v. Gardner, 2002 Me. 85, 797 A. 2d 738 (Me. 2002); State v. Hughs, 2004 Me. 141, 863 A. 2d 266 (Me. 2004).* Given that Ms. Miller and Mr. Mahood were compelled to Court by the State's actions making them Defendants in a Preliminary Protection

Petition and then a subsequent Petition for Termination of Parental Rights they did not have control of the litigation.

The remaining question is whether they actually did, or could have substantially participated in the litigation. There is no doubt that Ms. Miller and Mr. Mahood defended themselves in the action by the State. However, it would seem that substantial participation requires more than just defending oneself.

Substantial participation should mean the ability to litigate any claims or causes of action one has against the opposing party. Here, where the Rule prohibited Ms. Miller and Mr. Mahood from raising their current Federal claims in the State court action, it cannot be said they either could have or actually did substantially participate in litigating the issues relating to those claims.

The situation is identical to a §1983 Civil Rights Excessive Force claim during a valid arrest. Just because a Defendant defended himself, including raising the issue of excessive force as evidence of the arresting officer's bias against him in an attempt to undermine the officer's credibility in a robbery claim, for which he was subsequently convicted, does not mean that he had an opportunity to substantially participate in litigation on the excessive force issue. Similarly, defending oneself in a Termination of Parental Rights proceeding by attempting to show bias to attach the credibility of a witness, does not mean that the Plaintiffs were given an opportunity to substantially litigate the issues

underlying their ADA, Section 504, and Federal Civil Rights claim.

E. Neither Kristen Nichols nor Commissioner Harvey were parties to The underlying action

The res judicata doctrine of claim preclusion requires that:

> 1) The parties to the action are the same;
> 2) The facts asserted in the new action are the same as asserted in the previous actions, and;
> 3) The action of the prior tribunal constitutes a final adjudication by a court of competent jurisdiction.
> *Wolf v. Gruntal & Co., Inc 45 F.3d 524 (C.A. 1 Me. 1995); Town of Ogunquit v. Cliff House & Motels, 2000 Me. 169, 759 A. 2d 731 (Me. 2000).*

Issue preclusion has not, doctrinally, required the parties be the underlying action be the same as the current action. However, this Court recently ruled that:

> "A person who was not a party to a suit generally has not had a 'full and fair opportunity to litigate' the claims and issues settled in that suit. The application of claim and issue preclusion to non-parties thus runs up against the 'deep rooted historic

> tradition that everyone should have his own day in Court.' *Richards, 517 U.S. at 798" Taylor v. Sturgill, U.S. Supreme Court 07-371, June 12, 2008.*

Taylor certainly suggests that the doctrine of issue preclusion can only operate against one who has been a party to the underlying action.

If an entity must be a party to a suit for any issues arising in that action to have a preclusive effect against them, the question then is, must an entity be a party to the action in order to assert issue preclusion? It would seem that the answer must be yes. To do otherwise gives a party the advantage of the best of both worlds. If a decision in a prior proceeding is unfavorable, the party argues that it was not involved in the prior proceeding and is entitled to its own day in Court. If the decision is favorable, the party claims it is entitled to the benefits of the decision of the prior proceeding.

It would seem that if a Defendant can fend off a claim of issue preclusion on the grounds that it has not had a fair opportunity to litigate because it was not involved in the underlying preceding then the obverse should be true as well. A Plaintiff should be able to fend off a claim of issue preclusion by a Defendant, because it has not had a fair opportunity to litigate against these specific parties.

F. The §1983 HIPPA Violations

The Federal District Court dismissed the Plaintiffs' Section 1983 claim on the grounds that the

Plaintiff had admitted that there was no private cause of action for HIPAA violations. A review of the Plaintiffs' brief confirms that the Plaintiffs acknowledged that their preliminary research did not contradict the assertions of the State. HIPAA does not seem to create a private cause of action for HIPPA violations.

However, the Plaintiffs argued then and re-assert now, that it is a well-recognized legal maxim that if the law recognizes a right, it must also recognize a remedy. HIPPA was enacted to ensure that citizens enjoyed a right of privacy in their medical records. While no specific right of privacy exists within the Bill of Rights this Court recognized a privacy right as a penumbra of the Fourth Amendment in *Griswold v. Connecticut, 381 U.S. 479 (1965).*

A claimant states a cause of action under 42 U.S.C. §1983 when they allege that an individual acting under the color of state law alleges a violation of their federally protected rights. In this case, Ms. Miller Miller alleges that HIPAA combined with the Fourth Amendment gave her a constitutionally protected privacy rights in her medical records. When a State actor, Kristen Nichols, disclosed those records, it was a violation of Ms. Miller's rights and should be actionable under §1983.

The need for a private enforcement remedy against a State actor is magnified by the fact that those Ms. Nichols admitted in open Court, in front of two State Assistant Attorney Generals, that she had forwarded unfavorable psychological records concerning Ms. Miller (specifically leaving out any

favorable records of Ms. Miller) to a doctor examining Ms. Miller's daughter for a Vitamin D deficiency, no enforcement action has been taken against Ms. Nichols. Even Ms. Nichols subsequent admission that there was no reason to send any of Ms. Miller's psychological records to her daughter's doctor was not enough to prompt an enforcement action against Ms. Nichols.

In the absence of any State initiated enforcement action against Ms. Nichols it would seem appropriate to permit Ms. Miller to utilize the provisions of Section 1983 to grant a remedy against state actors who violated her privacy rights guaranteed by the Federal HIPAA statute and the penumbras of the Fourth Amendment.

CONCLUSION

For the reasons set forth in this Petition, a Writ of Certiorari should issue to review the judgment and opinion of the First Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED NOVEMBER 4, 2009

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 09-1174

JANEEN MILLER; JAMES MAHOOD,

Plaintiffs, Appellants,

v.

KRISTEN NICHOLS; BRENDA HARVEY,
in her capacity as Commissioner of the
Maine Department of Health and Human Services,

Defendants, Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

[Hon. George Z. Singal, *U.S. District Judge*]

Before

Lynch , *Chief Judge*,
Torruella and Boudin , *Circuit Judges*.

November 4, 2009

Appendix A

LYNCH , *Chief Judge*. Plaintiffs are the parents of a child removed from them by the state after extensive proceedings resulted in a finding that the best interests of the child required termination of their parental rights. *In re G.M.*, No. PC-05-75 (Me. D. Ct. Jan. 23, 2008). The parents then sued in federal court, asserting violations of statutory and constitutional rights during the termination proceedings and particularly in reunification efforts mandated by state law. They sought injunctive relief to prevent a foster family's adoption of the child, as well as monetary damages.

Plaintiffs appeal from a district court order dismissing their suit for lack of jurisdiction and on the basis of issue preclusion. Because the injunction sought would negate the state court's judgment and because the factual issues underpinning plaintiffs' present claims for damages were addressed by the state court, the district court's dismissal on *Rooker-Feldman* and on issue preclusion grounds was appropriate. We affirm.

I.

We take the facts largely as described by the district court and drawn from the record of the state court proceedings. There are no facts in dispute that are material to the motion to dismiss. All facts recited are a matter of public record.

On December 25, 2005, plaintiffs Janeen Miller and James Mahood brought their biological infant daughter, G.M., to the emergency room of Mercy Hospital in

Portland, Maine, reporting that she had experienced a seizure. Fearing they were unable to treat G.M., the medical staff transferred the twenty-two-month-old to Maine Medical Center that night. Upon her arrival, doctors promptly diagnosed G.M. with severe failure to thrive, a diagnosis applied to infants whose physical development lags "far below usual levels for age." *Stedman's Medical Dictionary* 627 (26th ed. 1995). Despite the doctors' serious concerns about G.M.'s condition, Miller and Mahood objected to the performance of various medical tests, some of which were time sensitive, and insisted that G.M.'s symptoms were caused by a flu shot she had received that fall. After Miller and Mahood continued to resist efforts to treat G.M. for two days and gave vague and inconsistent answers about G.M.'s feeding patterns, medical staff became concerned for G.M.'s welfare while in her parents' care. The treating physician relayed her concerns to the Maine Department of Health and Human Services ("DHHS").

On December 27, 2005 DHHS obtained an Order of Preliminary Child Protection, placing the child in DHHS's temporary custody. Doctors expanded their diagnosis of G.M.'s condition to include "acute potentially life-threatening metabolic acidosis; temporary hypothyroidism; Vitamin D deficient rickets; profound developmental delays; and inadequate immunizations."

On May 8, 2006, a state district court judge entered a Jeopardy Order, placing G.M. in the full custody of

DHHS. In addition to recounting G.M.'s medical issues, the order identified the jeopardy presented to G.M. by each of her parents. The court particularly noted Miller's "mental health issues," including a potential psychotic disorder, as well as Mahood's "tendency to be passive in his relationship with [Miller]," a trait that the state court determined adversely impacted "[Mahood's] protective judgment." The parents agreed to the entry of the Jeopardy Order.

The issuance of the Jeopardy Order also required DHHS to engage in statutorily mandated efforts to reunify G.M. with her parents. Under Maine law, if a Jeopardy Order removes a child from parental custody and grants custody to DHHS, DHHS must play an active role in efforts to rehabilitate and reunify the family. *See* 22 M.R.S.A. § 4041(1-A)(A); *see also In re Christmas C.*, 1998 ME 258, 721 A.2d 629, 630 (Me. 1998). Maine law also places responsibilities on the child's parents, including "[r]ectify[ing] and resolv[ing] problems that prevent the return of the child to the home" and "[t]ak[ing] part in a reasonable rehabilitation and reunification plan." 22 M.R.S.A. § 4041(1-A)(B); *see also In re Christmas C.*, 721 A.2d at 630.

DHHS placed G.M. in a therapeutic foster home, where her health steadily improved. DHHS also worked with G.M.'s parents to develop a reunification plan, and assigned defendant Kristen Nichols, a social worker, to assist in the reunification effort. Following a psychiatric evaluation of Miller, DHHS determined that reunification services should be provided to the parents

separately. Mahood relocated to a separate residence from Miller, and G.M. had regular supervised visits with each of the parents individually. However, despite a court-approved agreement between the parties mandating Mahood's "separation from [Miller] 'in all areas,'" as a condition of reunification, Mahood and Miller maintained a relationship with each other.

Ultimately, DHHS concluded that reunification efforts had been unsuccessful. On October 16, 2006, DHHS filed a petition for the Termination of Parental Rights, alleging that G.M.'s biological parents remained unable or unwilling to protect G.M. from jeopardy and were "unable or unwilling to change in a timeframe designed to meet the needs of their daughter."

Between August and December of 2007, the Maine district court held nine days of hearings, reviewing testimony from twenty-one witnesses, including Miller and Mahood. On January 23, 2008, the court issued a thirteen-page order. After comprehensively evaluating the evidence that Miller and Mahood were unfit parents for G.M., the state court found that Miller suffered from "severe untreated mental health issues" and Mahood demonstrated deficient protective judgment.

The court specifically concluded that "Miller's lack of insight into her own mental health issues and her inability to recognize any contribution she or Mr. Mahood made to G.M.'s failure to thrive and developmental delays, in the face of the overwhelming evidence in th[e] record, provide[d] clear and convincing

evidence" that she was "unable to protect G.M. from jeopardy" and was unlikely to change in a reasonable period. It also found that Mahood similarly "continue[d] to lack insight as to the reason for G.M.'s removal [and] continue[d] to show no appreciation for the impact of his failure to exercise independent protective judgment on [G.M.'s] failure to thrive and the developmental delays from which she may never recover." These conclusions, among others, supported the court's determination that Miller and Mahood's parental rights had to be terminated.

The state district court further held that DHHS "ha[d] made reasonable efforts to rehabilitate and reunify the family," citing a variety of services that the agency had provided the family. Noting that G.M.'s foster parents were prepared to adopt her, the court concluded that it was in the best interest of G.M., who had been in foster care for more than two years, that parental rights be terminated.

Miller, Mahood, and G.M.'s guardian ad litem all filed requests for additional findings of fact and conclusions of law. On February 7, 2008, the state court issued an order, responding to some of the requests and deeming further findings unnecessary.

Miller and Mahood appealed the termination order to the Maine Supreme Judicial Court. On August 12, 2008, the Law Court affirmed the judgment. Its brief opinion held that the state trial court "could have found clear and convincing evidence in the record" to support

its determinations and that the "argument that [DHHS] did not engage in legitimate reunification efforts [wa]s not supported by the record." *In re G.M.*, Decision No. Mem. 08-149 (Me., Aug. 12, 2008). The parents' subsequent motion to reconsider was denied.

On October 22, 2008, Miller and Mahood filed a complaint in the federal court in Maine against both Nichols and her supervisor, Brenda Harvey, the commissioner of DHHS. The complaint sought injunctive and declaratory relief to prevent G.M.'s adoption by her foster family, as well as damages under the Americans with Disabilities Act ("ADA"), the Rehabilitation Act, the Health Insurance Portability and Accountability Act ("HIPAA"), and for various constitutional claims under 42 U.S.C. § 1983.

The complaint alleged in part that during the period when she served as G.M.'s caseworker, Nichols made no effort to accommodate Miller's possible mental illness and was consistently biased in favor of G.M.'s foster parents, and that this violated the ADA and Rehabilitation Act. Plaintiffs claimed that Nichols sought to condition Mahood's reunification with his daughter on his promise never to associate with Miller, in violation of both parents' First Amendment rights to free association. They also argued that Nichols threatened them with termination of parental rights if they did not waive their religious objections to immunizing G.M., in violation of their First Amendment rights to religious freedom. They further asserted that Nichols deliberately disclosed unfavorable information from Miller's mental

health records during a court-ordered medical evaluation of G.M., while withholding more favorable information, in violation of HIPAA.

On January 9, 2009, the federal district court of Maine held that it lacked subject matter jurisdiction over plaintiffs' claims for injunctive and declaratory relief under the *Rooker-Feldman* doctrine. *Miller v. Nichols*, 592 F. Supp. 2d 191, 196 (D. Me. 2009). It further found that plaintiffs' claims for damages were barred by the doctrine of issue preclusion and that, in any event, plaintiffs had no private right of action for HIPAA violations. *Id.* at 197 & n.1. Accordingly, it granted defendants' motion to dismiss. This appeal followed.

II.

The existence of federal subject matter jurisdiction, of a cause of action, and the applicability of res judicata, in the form of issue preclusion, are questions of law, subject to de novo review in this court. *See Amoche v. Guar. Trust Life Ins. Co.*, 556 F.3d 41, 48 (1st Cir. 2009) (subject matter jurisdiction); *Andrew Robinson Int'l, Inc. v. Hartford Fire Ins. Co.*, 547 F.3d 48, 51 (1st Cir. 2008) (failure to state a claim); *Global NAPs, Inc. v. Mass. Dep't of Telecomm.*, 427 F.3d 34, 43 (1st Cir. 2005) (issue preclusion).

Appendix A

A. *Rooker-Feldman Precludes Jurisdiction over Plaintiffs' Motion for Injunctive Relief*

The district court correctly determined that it lacked subject matter jurisdiction to review plaintiffs' motion for injunctive relief to prevent G.M.'s adoption. The *Rooker-Feldman* doctrine precludes federal jurisdiction over a challenge to a state court judgment to which the challenger was a party.[1] *See Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005); *Puerto Ricans for P.R. Party v. Dalmau*, 544 F.3d 58, 68 (1st Cir. 2008); *see generally* Wright, Miller & Cooper, *supra*, § 4469.1. Only the Supreme Court of the United States may invalidate state court civil judgments. *Exxon Mobil Corp.*, 544 U.S. at 292.

Federal courts' application of the *Rooker-Feldman* doctrine "does not depend on what issues were actually litigated in the state court."[2] *Maymo-Melendez v.*

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1. The doctrine has limited exceptions, none of which are at issue in this case. *See* 18 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4469.1, at 100-01, 127-37 (2d ed. 2002).

2. The Second Circuit recently discussed this point, using a hypothetical similar to the facts of this case, in *Hoblock v. Albany County Bd. of Elections*, 422 F.3d 77 (2d Cir. 2005). As the court explained, "a federal plaintiff cannot escape the *Rooker-Feldman* bar simply by relying on a legal theory not raised in state court." *Id.* at 87. The court continued: "Suppose a state court, based purely on state law, terminates a father's parental rights and orders the state to take custody of his son. (Cont'd)

Alvarez-Ramirez, 364 F.3d 27, 33 (1st Cir. 2004). Rather, *Rooker-Feldman* bars jurisdiction whenever "parties who lost in state court . . . seek[] review and rejection of that judgment in federal court." *Puerto Ricans For P.R. Party*, 544 F.3d at 68 (internal quotation marks omitted).

Here, plaintiffs' motion for injunctive relief is an effort to do an end run around the state court's judgment. In Maine, an order terminating parental rights explicitly severs biological parents' right to participate in adoption proceedings. 22 M.R.S.A. § 4056(3). The desired injunction would amount to a reversal of the Maine Supreme Judicial Court's ruling on the termination of plaintiffs' parental rights, which permitted G.M. to be adopted. *See id.*; *see also Hoblock*, 422 F.3d at 87. Accordingly, the district court's dismissal of plaintiff's motion for lack of subject matter jurisdiction was both necessary and appropriate.

B. *No Private Right of Action under HIPAA*

Plaintiffs conceded both before the district court and on this appeal that HIPAA does not create a private right of action. The district court properly dismissed

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(Cont'd)

If the father sues in federal court for the return of his son on grounds that the state judgment violates his federal substantive due-process rights as a parent, he is complaining of an injury caused by the state judgment and seeking its reversal. This he may not do, regardless of whether he raised any constitutional claims in state court, because only the Supreme Court may hear appeals from state-court judgments." *Id.*

plaintiffs' claims on this basis without additional discussion. Plaintiffs' argument that we should devise a new cause of action to accommodate their claim must fail. *See Alexander v. Sandoval*, 532 U.S. 275, 287, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001) (Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.") (internal quotation marks and citation omitted).

C. *The Factual Issues Underlying Plaintiffs' Claims Were Addressed by the State Court and Are Barred by Issue Preclusion*

The district court also correctly held that the factual issues underlying plaintiffs' remaining claims were addressed by the state court's judgment and cannot be relitigated under the doctrine of issue preclusion. Issue preclusion reflects the fundamental principle that courts should not revisit factual matters that a party previously litigated and another court actually decided. *See, e.g.*, *Enica v. Principi*, 544 F.3d 328, 336 (1st Cir. 2008); *see also* Wright, Miller & Cooper, *supra*, § 4416, at 386-87. It is well settled that state court decisions have the same preclusive effect in federal courts that they would have in the state where the judgment was issued. *See Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 373, 116 S. Ct. 873, 134 L. Ed. 2d 6 (1996). "Federal courts may not employ their own rules . . . in determining the effect of state judgments, but must accept the rules chosen by the State from which the judgment is taken." *Id.* (internal quotation marks omitted); *see also Westcott*

Constr. Corp. v. Firemen's Fund of N. J., 996 F.2d 14, 16 (1st Cir. 1993); Wright, Miller & Cooper, *supra*, § 4469, at 72-73. We look to Maine preclusion law.

Maine courts apply a two-part test to determine if issue preclusion applies, asking first "if the identical issue was determined by a prior final judgment" and second if "the party estopped had a fair opportunity and incentive to litigate the issue in a prior proceeding." *Portland Water Dist. v. Town of Standish*, 2008 ME 23, 940 A.2d 1097, 1099 (Me. 2008) (internal quotation marks omitted). The doctrine precludes courts from revisiting factual matters that meet this test, even when a second action seeks a different remedy than the initial litigation. *Id.*; *see also Macomber v. MacQuinn-Tweedie*, 2003 ME 121, 834 A.2d 131, 139 (Me. 2003).

Mutuality of parties is not required for issue preclusion. As plaintiffs concede in their brief, their argument that the parties to the prior action must be identical for issue preclusion to arise finds no support in Maine law. *See Hossler v. Barry*, 403 A.2d 762, 767 (Me. 1979) (finding mutuality of parties unnecessary for application of issue preclusion); *see also* Wright, Miller & Cooper, *supra*, § 4464, at 692.

We first address whether the identical factual issues plaintiffs raise in federal court were previously decided in the Maine state courts' proceedings. Plaintiffs' federal district court complaint alleges that Nichols violated their statutory and constitutional rights by not making adequate efforts to reunify the family. The

precise mechanisms for their failure were alleged to be: neglecting to accommodate Miller's disability, unlawfully sharing damaging mental health information with a state evaluator, falsely claiming to be a licensed social worker, inappropriately insisting that Mahood cut ties with Miller to avoid termination of his parental rights, and threatening to terminate plaintiffs' parental rights if they did not waive their religious objections to vaccinating G.M. Plaintiffs sued defendant Harvey under a theory of supervisory liability for Nichols's conduct.

Although plaintiffs make a variety of claims, the theme of their briefs in both the federal district court and this court is the failure to accommodate the parents' needs in the context of the reunification obligation.[3]

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3. Plaintiffs have failed to identify any purported violations of their civil rights other than those related to the alleged deficiencies in the reunification process. All other arguments are waived.

We are making no determinations about whether the ADA or the Rehabilitation Act in fact impose any obligation to accommodate disabilities on a state in this context. It is clear though that § 504 of the Rehabilitation Act prohibits discrimination but does not require "affirmative efforts to overcome the disabilities caused by handicaps." *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 410, 99 S. Ct. 2361, 60 L. Ed. 2d 980 (1979).

In particular, we do not get into whether plaintiffs are "qualified individual[s]" who have been "denied the benefits of . . . services, programs, or activities" "by reason of" their disability under the ADA. 42 U.S.C. § 12132. *Cf. Buchanan v.*

(Cont'd)

Their arguments in any event depend on an identical factual issue—the alleged biased failure to accommodate—and, for purposes of issue-preclusion analysis, are one and the same. Plaintiffs' complaint also references violations of civil rights, identifying only First Amendment religious and associational rights and privacy rights that they allege were violated during the reunification process. The state court proceedings addressed the factual issues underpinning each of these claims.

We do not accept plaintiffs' assertion that a state court has only addressed an issue for purposes of issue preclusion if the earlier state court opinion contains an explicit discussion of the facts. That is not the law.[4] *See Grubb*, 281 U.S. at 477-78; *see also Hoult v. Hoult*, 157 F.3d 29, 32 (1st Cir. 1998); Wright, Miller & Cooper, *supra*, § 4420, at 521. Nor do we reach the state's argument that the entry of any termination order

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(Cont'd)

Maine, 469 F.3d 158, 173-74 (1st Cir. 2006). The Maine Law Court has previously considered a case in which a mother contested the termination of her parental rights on the basis of the DHHS's alleged violations of the ADA. *See In re Angel B.*, 659 A.2d 277, 279 (Me. 1995). The court determined that the mother had failed to demonstrate any denial of services but did not explicitly address whether the ADA authorized her claim. *Id.*

4. Plaintiffs' variant on the argument is that there is no preclusion if the state courts did not resolve the statutory and civil rights issues by naming those statutes. That argument fails. *Grubb v. Pub. Util. Comm'n of Ohio*, 281 U.S. 470, 477-78, 50 S. Ct. 374, 74 L. Ed. 972 (1930).

necessarily means that the court found, as a matter of fact, that DHHS made reasonable but unsuccessful efforts at reunification and this necessarily, as a matter of law, precludes any further claims of lack of reasonable accommodations. Instead, we find that, on this record, plaintiffs actually made, and the state courts addressed, the contention that the state social work agency was biased and had not accommodated the parents' needs.

Under Maine law, courts may review the record and assess specific findings made by the prior court to determine precisely what issues were addressed in a prior judgment. *See Macomber*, 834 A.2d at 139-40 (evaluating the record as well as a previous court's order before concluding that issue preclusion did not bar plaintiff's claim); *see also* Wright, Miller & Cooper, *supra*, § 4420, at 510, 520.

An explanation of the Maine law on termination of parental rights sets the stage for our evaluation of the factual issues addressed in the state court proceedings. Under the state statute, 22 M.R.S.A. § 4041, DHHS must make "good faith efforts" to cooperate with parents in pursuit of reunification. *Id.* at 1-A(A)(3). This obligation arises as soon as the child is deemed to have entered foster care. *Id.* at 1-A.

The record reflects that plaintiffs vigorously challenged at every turn the reasonableness of social worker Nichols's efforts at reunification. For example, they elicited testimony from Nichols about her handling of Miller's mental health. On cross-examination, counsel

for one of the parents questioned Nichols directly about her familiarity with the ADA and made repeated inquiries into any "reasonable accommodations" she made for Miller's disability.

The state district judge rejected this line of reasoning and concluded that, based on the evidence before her, DHHS "ha[d] made reasonable efforts to rehabilitate and reunify the family and to finalize the permanency plan by providing extensive supervised visitation, counseling for the mother, a therapeutic foster home, in-home parenting, and caseworker services." Whether or not required by Maine law to make such a determination, explicitly or implicitly, in order to terminate parental rights, the district court specifically identified a series of reasonable steps taken by DHHS to address G.M.'s family's needs in light of the parents' circumstances. In doing so, the court rejected plaintiffs' factual assertions to the contrary.

Miller revisited these factual issues in her motion for further findings, which urged the court to find that Nichols had shared records "identifying . . . Miller as having a mental illness" and that Nichols failed to accommodate Miller's "mental health disability." Mahood's motion for further findings of fact suggested that the court should reject Nichols's testimony on Mahood's cooperation in the reunification effort outright. The court declined to do so. Instead, its order on these motions emphasized the "careful consideration" that it had already given "to all the evidence presented."

Plaintiffs argued these factual issues yet again before the Maine Supreme Judicial Court. Mahood specifically

sought review of whether DHHS's reconciliation efforts were "appropriate." The Law Court affirmed the district court's judgment and explicitly held that "the father's argument that the Department did not engage in legitimate reunification efforts is not supported by the record."

Following the rejection of plaintiffs' arguments on appeal, plaintiffs filed a motion for reconsideration. In their motion, they persisted in urging consideration of the fact that defendant Nichols "was inexperienced and biased against individuals with a perceived mental health issue." Once more, the Law Court considered this factual matter and ultimately denied plaintiffs' motion for reconsideration.

Plaintiffs assert that the issues raised in the federal complaint were not essential to the state court decisions and, if not essential, are not subject to issue preclusion. *See Beale v. Chisholm*, 626 A.2d 345, 347 (Me. 1993). They say that, as a matter of law, the termination proceeding necessarily concluded only that (1) G.M. was in jeopardy, (2) termination was in the best interests of the child, and (3) the circumstances of the parents' unwillingness or inability to protect the child from jeopardy are not likely to change in time reasonably to meet the child's needs. *See* 22 M.R.S.A. § 4055(1)(A) (1)(a), (B)(2)(a)-(b). This argument ignores both the constituent components of the second finding and what actually happened in the state court proceedings. It fails.

We now turn to the second prong of issue preclusion under Maine law. For issue preclusion to apply, a party must have a "fair opportunity and incentive to litigate the

issue in [the] prior proceeding." *Portland Water Dist.*, 940 A.2d at 1100 (internal quotation marks omitted). Under Maine law, "[a] party has a *fair opportunity* to litigate an issue if that party either controls the litigation, substantially participates in that litigation, or could have participated in the litigation had they chosen to do so." *State v. Hughes*, 2004 ME 141, 863 A.2d 266, 269 (Me. 2004) (emphasis in original).

It is clear that since plaintiffs actually litigated the issues in state court, they had both incentive and opportunity to present the claims. In the face of this obvious fact, they resort to one final argument. They say that their federal claims could not have been litigated before the state court. Plaintiffs rely on Maine R. Civ. P. 80, which precludes counterclaims in cases of determinations of parental rights and responsibilities. But plaintiffs misunderstand the rule. In fact, plaintiffs defensively used arguments that the state had failed to make reasonable efforts to reunify the family because it had not reasonably accommodated whatever disabilities the plaintiffs had.

Finally, because all claims against defendant Nichols are either without merit, precluded, or waived, any claim of supervisory liability against defendant Harvey must also fail. *See, e.g., Rivera v. Rhode Island*, 402 F.3d 27, 38-39 (1st Cir. 2005) ("Since the plaintiff has failed to state a constitutional claim at all, her claims against the other defendants for supervisory liability . . . fail.").

We *affirm* the district court's dismissal of all of plaintiffs' claims.

APPENDIX B — ORDER ON PENDING MOTIONS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE DATED JANUARY 9, 2009

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Docket no. 2:08-cv-355-GZS

JANEEN MILLER & JAMES MAHOOD,

Plaintiffs,

v.

KRISTEN NICHOLS & BRENDA HARVEY,
Commissioner of the Maine Department of
Health & Human Services,

Defendants.

ORDER ON PENDING MOTIONS

Before the Court are Plaintiffs' Motion for Temporary Restraining Order/Preliminary Injunction (Docket #s 7 & 9) and Defendants' Motion to Dismiss (Docket # 26). As explained herein, the Court GRANTS the Motion to Dismiss and, therefore, DENIES as MOOT Plaintiffs' Motion for Temporary Restraining Order/Preliminary Injunction.

Appendix B

I. STANDARD OF REVIEW

Defendant has moved to dismiss all of Plaintiffs' claims under Federal Rule of Civil Procedure 12(b)(1) & (6). Pursuant to Rule 12(b)(1), a party may move to dismiss a case for lack of subject matter jurisdiction. *See, e.g., American Fiber & Finishing, Inc. v. Tyco Healthcare Group, LP*, 362 F.3d 136, 138 (1st Cir. 2004) ("Federal courts are courts of limited jurisdiction. In the absence of jurisdiction, a court is powerless to act."); *see also* Fed. R. Civ. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."). Pursuant to Rule 12(b)(6), a party is entitled to have a claim against it dismissed when the allegations on which the claim depends "fail[ ] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6).

When considering any motion under Rule 12(b), the Court accepts as true the well-pleaded factual allegations of the complaint and draws all reasonable inferences in the plaintiff's favor. However, in determining the existence of subject matter jurisdiction, the Court is not confined to the pleadings and may consider other reliable materials in the record to the extent those materials "illuminate [], supplement [], or even contradict [] other materials in the . . . record." *Aguilar v. U.S. Immigration & Customs Enforcement Div. of Dep't of Homeland Sec.*, 510 F.3d 1, 8 (1st Cir. 2007). Ultimately,

the plaintiff bears the burden of establishing the existence of subject matter jurisdiction. *See Aversa v. United States*, 99 F.3d 1200, 1209 (1st Cir. 1996).

Only after the Court has determined it has jurisdiction may it turn to the question of the sufficiency of the complaint. Then, the Court must determine whether the complaint, when taken in the light most favorable to the plaintiff, sets forth sufficient facts to support the claim for relief. *Clorox Co. v. Proctor & Gamble Commercial Co.*, 228 F.3d 24, 30 (1st Cir. 2000); *LaChapelle v. Berkshire Life Ins. Co.*, 142 F.3d 507, 508 (1st Cir. 1998). Pursuant to Rule 8(a), the pleader need only make "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Despite the liberal pleading standard of Rule 8, to survive a motion to dismiss, a complaint must allege "a plausible entitlement to relief." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, , 127 S. Ct. 1955, 1967, 167 L. Ed. 2d 929 (2007).

II. BACKGROUND

The parties have provided the Court with voluminous records from the state court custody proceedings that serve as the basis for this case. The relevant facts laid out below are culled from both the pleadings and these records. While the Court has reviewed the entire docket, given the limited nature of the Court's inquiry and the confidential nature of the proceedings below, the Court limits its recitation of the facts to the extent possible.

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On December 25, 2005, G.M., the biological daughter of Plaintiffs Janeen Miller and James Mahood, was taken to the emergency room at Mercy Hospital. At the time, G.M. was 22 months old. She was transferred to Maine Medical Center where she was treated by Dr. Haymann. Dr. Hayman, in turn, reported her observations of G.M. and Miller to the Maine Department of Health and Human Services ("DHHS"). On December 27, 2005, DHHS sought an order of preliminary child protection over G.M. With the parents' consent, that order was entered on January 9, 2006.

With this order in place, G.M. was placed in a therapeutic foster home. DHHS assigned Defendant Kristen Nichols as the social worker for G.M.'s case with the expressed goal of reunifying G.M. with Miller and Mahood. By all accounts, the relationship between Nichols and Miller was unproductive. As alleged in the Complaint, Nichols perceived Miller as having a disability, namely, a mental illness, but admittedly took no steps to provide Miller with any accommodations and, in fact, denied Miller access to some DHHS services. Nichols also conditioned Mahood's reunification with G.M. on him promising to not associate with Miller. In the course of G.M.'s court-ordered medical evaluations in 2007, Nichols, without proper authorization, sent the evaluator selected unfavorable psychiatric records of Miller. Plaintiffs claim that Nichols also misrepresented her status as a licensed social worker when she only had a conditional license. Plaintiffs seeks to hold Defendant Harvey liable for the alleged wrongs of Defendant Nichols claiming that there was a failure to properly

train and supervise Nichols in connection with her work on G.M.'s case.

On October 16, 2006, DHHS filed its Petition for the Termination of Parental Rights, which sought to permanently terminate the parental rights of Plaintiffs as to G.M. Judge Bradley of the Maine District Court conducted eight days of hearings in August through October 2007. After reviewing the evidence received at those hearings, Judge Bradley reopened the record and received additional testimony on December 14, 2007. At the close of this last hearing, Judge Bradley admittedly expressed that she was inclined to deny termination. (*See* Feb. 7, 2008 Order (Docket # 25-4) at 1 n.1.)

Nonetheless, after a full review of all of the evidence, Judge Bradley filed a 13-page Order Terminating Parental Rights (Docket # 16) on January 23, 2008. In this Order, Judge Bradley found "clear and convincing evidence that Janeen Miller has severe untreated mental health issues" and that these issues, in turn, have left Miller "unable to protect [her daughter] from jeopardy." (Order (Docket # 16) at 8-9.) As to James Mahood, the court concluded that he was "unable to safely parent his child." (*Id.* at 9.) The Court also concluded that DHHS had "made reasonable efforts to rehabilitate and reunify the family" and that after two years in a therapeutic foster home, it was in the best interests of the child that parental rights be terminated. (*Id.* at 12.)

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Miller, Mahood and the Guardian Ad Litem all requested additional findings of fact and conclusions of law following the receipt of the District Court's January 23, 2008 Order. Miller requested specific findings that Nichols violated the ADA and HIPAA during her management of the case. (*See* Miller Add'l Requests for Ruling (Docket # 25-3) at 6-7.) Ultimately, Judge Bradley refused to make these additional requested findings. (*See* Feb. 7, 2008 Order (Docket # 25-4) at 12.)

The parents appealed Judge Bradley's decision to the Maine Law Court. Miller's Appellant Brief explicitly included claims that Nichols "violated the Americans with Disabilities Act, HIPAA and 42 U.S.C. § 1983." (Appellant Brief (Docket # 24-3) at 4, 25, 36-37.) In a similar vein, Mahood's Appellant Brief included arguments that "the State did not attempt to provide proper reunification." (Appellant Brief (Docket # 24) at 20-21.) In a short decision dated August 12, 2008 (Docket # 16-2), the Law Court affirmed the District Court's decision terminating the parental rights of both Miller and Mahood. Appellants then sought reconsideration. In their Brief in Support of the Motion for Reconsideration (Docket # 24-5), Appellants primarily argued that there were violations of substantive due process, invoked the bias of Nichols and again alleged ADA violations. (*See* Reconsideration Brief (Docket # 24-5) at 4-8.) The Law Court denied the parents' motion for reconsideration on September 9, 2008. (*See* Order Denying Motion to Reconsider (Docket # 16-3).)

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On October 20, 2008, Plaintiffs filed the instant Complaint (Docket # 1) with this Court. Three weeks later, Plaintiffs filed the pending Motion for TRO/ Preliminary Injunction (Docket # 7). Plaintiffs' Amended Complaint (Docket # 3) states claims under the Americans with Disabilities Act (Counts I & II), Section 504 of the Rehabilitation Act (Count III), 42 U.S.C. § 1983 (Freedom of Religion) (Count IV), Violations of HIPAA,[1] the Privacy Act and 42 U.S.C. § 1983 (Count V), 42 U.S.C. § 1983 (Freedom of Association) (Count VI), 42 U.S.C. § 1983 (Fraud in Deprivation of liberty Interest) (Count VII), and 42 U.S.C. § 1983 (Supervisory Liability) (Count VIII). In Count IX, the Amended Complaint also seeks injunctive and declaratory relief for the various violations of Plaintiffs' substantive due process rights, including an order enjoining DHHS from placing G.M. up for adoption and an order allowing Plaintiffs continued visitation.

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1. HIPAA is the acronym for the Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-191, 110 Stat. 1936. In connection with the pending motions, Defendant asserted that there is no private right of action under HIPAA. (*See* Def. Mot. to Dismiss (Docket # 26) at 12.) In response, Plaintiffs agreed that it could find no research suggesting that there is a private right of action for HIPAA violations. (*See* Pls. Response (Docket # 27) at 11.) Thus, the Court need not further discuss or consider the "HIPAA claim" asserted in Count V and considers that portion of Count V DISMISSED without objection.

III. DISCUSSION

Despite the troubling factual allegations of this case, this Court, as a federal court with limited jurisdiction, cannot serve as a forum for the Plaintiffs to relitigate issues already raised and decided in the prior state court proceedings. Defendants specifically invoke two legal doctrines, which they argue prevent the Court from hearing any of Plaintiffs' asserted claims: (1) the Rooker-Feldman doctrine and (2) issue preclusion.

A. The *Rooker-Feldman* Doctrine

Pursuant to the Rooker-Feldman doctrine and 28 U.S.C. § 1257, a party who obtains a final judgment from the highest court of a state — in this case, from the Maine Law Court — may only have that judgment reviewed by writ of certiorari to the United States Supreme Court. The Rooker-Feldman doctrine precludes "parties who lost in state court from 'seeking review and rejection of that judgment' in federal court." *Puerto Ricans for Puerto Rico Party v. Dalmau*, 544 F.3d 58, 68 (1st Cir. 2008) (quoting *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005)). To the extent that Plaintiffs have asked the Court to "enjoin the State from placing G.M. up for adoption" (Am. Compl. P 143; Pls. Mot. for TRO/Prelim. Inj. (Docket # 7) at 33), it would appear that Plaintiffs are in fact asking this Court to review and reject the final judgment affirmed by the Law Court on August 12, 2008. (*See* In re G.M. Memorandum of Decision (Docket # 16-2).) In fact,

multiple federal courts have acknowledged that federal cases seeking to challenge the termination of parental rights by state courts fall within the heartland of cases preempted by the Rooker-Feldman doctrine. *See, e.g., Hoblock v. Albany County Bd. of Elections*, 422 F.3d 77, 87 (2d Cir. 2005) ("Suppose a state court . . . terminates a father's parental rights and orders the state to take custody of his son. If the father sues in federal court for the return of his son on grounds that the state judgment violates his federal substantive due-process rights as a parent, he is complaining of an injury caused by the state judgment and seeking its reversal. This he may not do, regardless of whether he raised any constitutional claims in state court, because only the Supreme Court may hear appeals from state-court judgments."); *Doe v. Mann*, 415 F.3d 1038, 1043 (9th Cir. 2005) (concluding that a challenge to the termination of parental rights fell "within the traditional boundaries of the Rooker-Feldman doctrine" while ultimately holding that there was jurisdiction based on a narrow exception for "child custody proceedings involving Indian children"). With respect to the claims now asserted by Plaintiffs, there is no doubt that Count IX, which asks for injunctive and declaratory relief, essentially seeks to overturn the termination of parental rights; such a claim is clearly precluded under the Rooker-Feldman doctrine. On this basis, the Court finds that it has no jurisdiction to grant Plaintiffs the injunctive and declaratory relief sought in Count IX and in the pending Motion for Preliminary Injunction.

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In responding to Defendants' Motion to Dismiss, Plaintiffs argue that this case falls outside Rooker-Feldman because they now seek damages for various civil rights violations as well as violations of the ADA and the Rehabilitation Act. They emphasize that these rights were violated not by the state court but by DHHS, specifically Nichols. As to Plaintiffs' remaining claims, this argument has merit. As the Supreme Court has recently held in *Exxon Mobil*, the Rooker-Feldman doctrine does not deprive a district court of subject-matter jurisdiction "simply because a party attempts to litigate in federal court a matter previously litigated in state court. If a federal plaintiff presents some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party . . . , then there is jurisdiction and state law determines whether the defendant prevails under principles of preclusion." *Exxon Mobil*, 544 U.S. at 293 (internal quotation omitted). To the extent that Plaintiffs' Complaint seeks money damages for alleged violations of the ADA, Section 504 of the Rehabilitation Act and 42 U.S.C. § 1983 from Defendants Nichols and Harvey, these claims would appear to fall within this exception to the Rooker-Feldman doctrine described in *Exxon Mobil*. Thus, in accordance with the direction of the *Exxon-Mobil* opinion, the Court proceeds to consider whether Plaintiffs' remaining claims are precluded.

B. Issue Preclusion

Unlike 28 U.S.C. § 1257 and Rooker-Feldman Doctrine, the question of whether a judgment is final for purpose of preclusion is a question of state law. *See Federacion de Maestros de Puerto Rico v. Junta de Relaciones del Trabajo de Puerto Rico*, 410 F.3d 17, 22 n.8 (1st Cir. 2005). Under Maine law, res judicata may be found on the basis of either claim preclusion or issue preclusion. *Portland Water Dist. v. Town of Standish, 2008 ME 23*, 940 A.2d 1097, 1099 (Me. 2008). "Whereas claim preclusion is focused on the claims set forth in the prior proceeding, [issue preclusion] concerns factual issues, and applies even when the two proceedings offer different types of remedies."[2] *Id.* at 1100.

The requirements of issue preclusion under Maine law are: (1) the identical issue was determined by a prior final judgment, and (2) the party estopped had a fair opportunity and incentive to litigate the issue in a prior proceeding." *Machias Sav. Bank v. Ramsdell*, 1997 ME 20, 689 A.2d 595, 599 (Me. 1997). In examining the first

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2. In opposing the Motion to Dismiss, Plaintiffs argue (without citation) that they had no right to a jury trial in the termination proceeding and, thus, should be allowed to pursue their claims under the ADA and 42 U.S.C. § 1983 in a separate action where they can have a jury trial. (*See* Pls. Resp. (Docket # 27) at 8.) However, in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979), the Supreme Court held a litigant's right to a jury trial was not violated by the application of issue preclusion due to a prior action in which the facts were not decided by a jury. *See id.* at 334.

requirement, the Court looks at what issues were determined in the proceeding that resulted in the termination of Plaintiffs' parental rights. In that state court action, Plaintiffs' parental rights were terminated as the result of a petition filed by DHHS in accordance with 22 M.R.S.A. § 4052. The petition was then decided by the state court in accordance with the standard laid out in 22 M.R.S.A. § 4055. While the overriding focus of the court's decision is "the best interest of the child," the statute requires the court hearing the petition to consider, in relevant part, all of the efforts made by DHHS to reunify the family. *See In re Justin T.*, 640 A.2d 737, 740 (Me. 1994) (noting that DHHS' "failure to meet its reunification obligations is only one factor to be considered in a termination case"). Thus, one of the issues explicitly decided in the termination proceeding was that DHHS "made reasonable efforts to rehabilitate and reunify the family." (Order (Docket # 16) at 12.) Plaintiffs' current claims essentially ask this Court to find that DHHS' reunification efforts in the case of G.M. were marred by violations of Plaintiffs' constitutional rights and violations of Miller's statutory rights under the ADA and the Rehabilitation Act. If true, DHHS' reunification effort would necessarily be inadequate and unreasonable. In short, the Court could not make the factual findings necessary to support Plaintiffs' claims without reexamining identical issues that were decided in the prior case.

As to the second prong, the Court finds Plaintiffs had a fair opportunity and incentive to litigate the issues now raised in this case in the prior state case. First, the

record amply demonstrates that Plaintiffs substantially participated in the litigation. *See State v. Hughes*, 2004 ME 141, 863 A.2d 266, 269 (Me. 2004) ("A party has a *fair opportunity* to litigate an issue if that party either controls the litigation, substantially participates in that litigation, or could have participated in the litigation had they chosen to do so.") Given what was at stake, the Court also finds that Plaintiffs had every incentive to litigate the issues surrounding DHHS' reunification efforts as well as any deprivation of constitutional rights or bias that contributed to DHHS' petition to terminate Plaintiffs' parental rights. In fact, the briefs provided to this Court show that Plaintiffs raised these issues repeatedly but neither the Maine District Court nor the Law Court found these issues had merit or made factual findings that would support a claim under 42 U.S.C. § 1983, the ADA or the Rehabilitation Act. Moreover, in an effort to show that it is possible to raise an ADA claim in the context of a termination proceeding, Defendants have brought to this Court's attention at least one reported Maine case in which a mother did raise claims that DHHS violated the ADA in the context of a termination proceeding. *See In re Angel B.*, 659 A.2d 277, 279 (Me. 1995). In short, the Court finds that the factual issues raised by Plaintiffs' claims are identical to some of the factual issues decided in the prior state court proceeding and that Plaintiffs had the opportunity and incentive to litigate those issues in the prior proceeding.

Having found that the Court lacks subject matter jurisdiction over Plaintiffs' claims for injunctive and declaratory relief and that Plaintiffs' remaining claims are barred by res judicata as a result of issue preclusion, the Court need go no further.

IV. CONCLUSION

The Court hereby GRANTS Defendants' Motion to Dismiss (Docket # 26) and, on that basis, DENIES as MOOT Plaintiffs' Motion for Temporary Restraining Order/Preliminary Injunction (Docket #s 7 & 9). In light of these rulings, the hearing scheduled for January 12, 2009 is CANCELLED.

SO ORDERED.

/s/ George Z. Singal
United States District Judge

Dated this 9th day of January, 2009.